

Montana Water Court
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FILED
07/12/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0887-R-2022
Lambert, Kathryn
7.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Dancing Wind LLC; Joy Larsen-McEvans

CASE 43B-0887-R-2022
43B 45971-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

This claim appeared in the Preliminary Decree with the following issue remark:

IT APPEARS MORE THAN ONE WATER RIGHT MAY BE INVOLVED. CURRENT
POLICY NOW REQUIRES IMPLIED CLAIMS BE AUTHORIZED BY THE WATER COURT.

The issue remark was not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by

the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimants an opportunity to file additional information or evidence. On May 2, 2023 Dancing Wind LLC filed its Notice Of Filing Information Resolving Issue Remark And Request For Show Cause ["Information"]. The May 22, 2023 Order Setting Show Cause Deadline states:

The default of Joy Larsen-McEvans was entered on January 19, 2023 for her failure to appear at the January 17, 2023 Scheduling Conference. The Court will now act on that default. Pursuant to section 85-2-248(9)(a), MCA, it is ORDERED that the deadline is **June 12, 2023** for Joy Larsen-McEvans to show cause in writing why the Court should not proceed with amending claim 43B 45971-00 as described in Dancing Wind LLC's Notice Of Filing Information Resolving Issue Remark And Request For Show Cause. If no additional information is filed by this deadline, the Court will proceed with amending the claim as requested by Dancing Wind LLC.

Nothing was filed. These documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

" 'Implied Claim' means a claim authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights." Rule 2(a)(33), W.R.C.E.R.

From 41P-108 "Circle S Ranch, Inc." Order On Motion To Modify Claims 5-16-19, at 2019 Mont. Water LEXIS 8, page 5:

The Water Court recognizes implied claims in certain circumstances *In re Musselshell River below Roundup*, Case 40C-47, 1994 Mont. Water LEXIS 18, *78 (July 14, 1994). However, before the Court will recognize an implied claim, the claimant must prove that several factors exist. These include: (1) proof of two or more water rights in the original claim form or the material submitted with the claim form; (2) proof of historic use corroborating the implied claim; and (3) proof that recognizing the implied claim(s) will avoid causing a change to historic water use or increase the historic burden to other water users. *In re Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, *32 (Jan. 31, 2013); *In re Martinell*, Case 41A-148, 2018 Mont. Water LEXIS 3, *6 (June 14, 2018). These standards assure that implied claims are not used to revive a claim that was forfeited as a matter of law by missing the filing deadline. Mont. Code Ann. § 85-2-226 (establishing conclusive presumption of abandonment of for claims not timely filed); *In re*

Climbing Arrow Ranch, Case 41F-A19, 2019 Mont. Water LEXIS 1 (Mar. 6, 2019). The implied claim process also cannot be used to expand the elements of a statement of claim. *In re Eliasson Ranch Company*, Order Amending and Adopting Master's Report, Case 40A-115, 2004 Mont. Water LEXIS 2, *6 (Jun. 28, 2004) ("*Eliasson*").

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. A review of the Statement of Claim and its attachments shows that two previously decreed rights were combined as a single claim. The two rights are the Floyd G. Nelson and Mildred Nelson 100 miner's inches, South Fork of Deep Creek, priority date March 21, 1968 right, and the Floyd G. Nelson and Mildred Nelson 100 miner's inches, South Fork of Deep Creek, priority date March 22, 1968 right, both decreed in Cause Number 12611, *Abbott v. Foltz*, Sixth Judicial District in and for Park County (1975).

2. Claim 43B 45971-00 should be used for the March 21, 1968 right. Implied claim 43B 30160042 should be used for the March 22, 1968 right.

3. For claim 43B 45971-00, the Preliminary Decree states that the flow rate is 5.00 CFS. The flow rate should be 2.50 CFS. The issue remark should be removed as addressed and resolved.

4. The elements of implied claim 43B 30160042 should be the same as 43B 45971-00 except the priority date should be March 22, 1968.

CONCLUSION OF LAW

Statement of Claim 43B 45971-00 and its attachments plus the Information filed by Dancing Wind LLC are sufficient to generate an implied claim, and sufficient to resolve the issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court generate implied claim 43B 30160042 and make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Joy Larsen-McEvans
~~121 N Yellowstone St~~
~~Livingston, MT 59047~~
(Return mail received)
(406) 222-6765 H

Service via Email:

Benjamin Sudduth
Sudduth Law, PLLC
1050 East Main St Ste 3B
PO Box 507
Bozeman, MT 59771-0507
(406) 272-2390
benjamin@sudduthlaw.com

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 45971-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JOY LARSEN-MCEVANS
2471 E RIVER RD
LIVINGSTON, MT 59047 9142

DANCING WIND LLC
C/O RICHARD BERTHY
11 DREW RD
SOUTH PORTLAND, ME 04106

Priority Date: MARCH 21, 1968

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 2.50 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 420.00

Source Name: DEEP CREEK, SOUTH FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWSW	32	3S	10E	PARK

Period of Diversion: APRIL 15 TO AUGUST 1

Diversion Means: HEADGATE

Ditch Name: BOWLES-GIRDLER-NELSON DITCH

Period of Use: APRIL 15 TO AUGUST 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	65.00		E2NW	6	4S	10E	PARK
2	40.00		SWSW	6	4S	10E	PARK
3	135.00		NE	6	4S	10E	PARK
4	20.00		NWNW	7	4S	10E	PARK
5	40.00		N2NE	12	4S	9E	PARK
6	80.00		S2SE	1	4S	9E	PARK
7	40.00		SESW	1	4S	9E	PARK

Total: 420.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

45962-00	45963-00	45964-00	45965-00	45966-00	45967-00
45968-00	45969-00	45970-00	45971-00	30160042	

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 30160042 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: JOY LARSEN-MCEVANS
2471 E RIVER RD
LIVINGSTON, MT 59047 9142

DANCING WIND LLC
C/O RICHARD BERTHY
11 DREW RD
SOUTH PORTLAND, ME 04106

Priority Date: MARCH 22, 1968

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 2.50 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 420.00

Source Name: DEEP CREEK, SOUTH FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWSW	32	3S	10E	PARK

Period of Diversion: APRIL 15 TO AUGUST 1

Diversion Means: HEADGATE

Ditch Name: BOWLES-GIRDLER-NELSON DITCH

Period of Use: APRIL 15 TO AUGUST 1

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	65.00		E2NW	6	4S	10E	PARK
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3	135.00		NE	6	4S	10E	PARK
4	20.00		NWNW	7	4S	10E	PARK
5	40.00		N2NE	12	4S	9E	PARK
6	80.00		S2SE	1	4S	9E	PARK
7	40.00		SESW	1	4S	9E	PARK

Total: 420.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

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